

Pindoriya (Migration) [2019] AATA 6733 (9 December 2019)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Mr Pareshkumar Premji Pindoriya Mr Vyom Pareshkumar Pindoriya Mrs Neetaben Pareshkumar Pindoriya
CASE NUMBER:	1804862
DIBP REFERENCE(S):	BCC2016/2425918
MEMBER:	Antonio Dronjic
DATE:	9 December 2019
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the applications for Employer Nomination (Permanent) visas for reconsideration, with the directions that • the third named applicant meets the Public Interest Criterion 4020 for the purposes of cl.186.313(1) of Schedule 2 to the Regulations; and • the first named applicant meets cl.186.213(3) of Schedule 2 to the Regulations. • • Statement made on 09 December 2019 at 11:22am

CATCHWORDS

MIGRATION – Employer Nomination (Permanent) (Class EN) visa – Subclass 186 (Employer Nomination Scheme) – secondary applicant's document false or misleading in a material particular – proof of functional English – medium of instruction at the applicant's college – adverse effect upon sponsoring business – compelling circumstances to waive criterion – relevant to the criteria considered – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5(1), 65

Migration Regulations 1994, Schedule 1 Item 1114B; Schedule 2, cls 186.213, 186.313, 186.4; Schedule 4, Public Interest Criterion 4020

CASES

Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Kaur v MIBP [2014] FCCA 1264
Singh v MIAC [2012] FMCA 145
Singh v MIBP [2015] FCCA 1939
Singh v MIBP [2018] FCCA 1136
Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Immigration on 8 February 2018 to refuse to grant the applicants Employer Nomination (Permanent) visas under s.65 of the *Migration Act 1958* (the Act).
5. The applicants applied for the visas on 21 July 2016. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy cl.186.213(3) of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the secondary applicant, Mrs Neetaben Pareshkumar Pindoriya, was unable to meet Public Interest Criterion (PIC) 4020 of Schedule 4 to the Regulations for the purposes of cl.186.313(1).
6. The delegate found that Mrs Pindoriya has provided false or misleading information in the form of a letter from Shri J. B. Thacker Commerce College, from India (the College) issued on 1 December 2016. The document was provided in order to satisfy the functional level of English requirement for Mrs Pindoriya. This letter stated that the medium of instruction for her Bachelor of Commerce degree completed in India was English. The Departmental checks have confirmed that the medium of instruction at the College is Gujarati and that the only English language subject was taught in English.
7. On 27 July 2017, the Department invited the applicants to comment on adverse information. In response to this invitation, Mrs Pindoriya submitted a letter dated 21 August 2017, stating inter alia that she was not fully aware about the fact that her entire course needed to be completed in English language (as per functional English language requirement) and that she misinterpreted words 'course and subject'.
8. The delegate found that the letter regarding the medium of instruction at the College provided for Mrs Pindoriya is false and misleading in a material particular because this information is relevant to Item 1114B(2)(b) of Schedule 1 of the Regulations and to cl.186.4 of Schedule 2 of the Regulations (circumstances applicable for the visa grant).
9. The applicants lodged an application for review of the delegate's decision with the Tribunal on 23 February 2018 and with their applications enclosed a copy of the primary decision record. The applicants were represented by their registered migration agent.
10. On 25 October 2019, the Tribunal wrote to the applicants advising them that it had considered the material before it and was unable to make a favourable decision on this material alone, and invited the applicants to attend the hearing on 3 December 2019. With the same letter, the applicant was informed that on 21 March 2018, a s.375A certificate was issued by the Department and invited their submissions in relation to the validity of the certificate. The applicants did not provide any comments related to the validity of the s.375A certificate.
11. The applicants appeared before the Tribunal on 3 December 2019 to give evidence and present arguments. The applicants were represented in relation to the review by their registered migration agent. At the commencement of the hearing the Tribunal explained to the applicants the requirements of PIC 4020. The applicants' representative submitted:
 - Copies of job advertisements for cabinetmakers in Australia;
 - Copy of ANZSCO survey results from 2014 to 2018 as evidence of shortage of cabinetmakers in Australia;

- Employment outlook for cabinetmakers in Australia;
 - A copy of the letter from Baseline Windows and Doors Australia Pty Ltd (the first named applicant's employer) dated 2 December 2019, attesting to Mr Pindoriya's skills, stating that he is the only qualified worker, that he trains four other employees and that the business will be adversely affected if Mr Pindoriya is not allowed to stay in Australia;
 - List of Baseline Windows and Doors Australia Pty Ltd employees and organisational chart;
 - A copy of the letter from Mr Pindoriya dated 26 November 2019; and
 - A copy of the Pearson Academic score report for Mrs Pindoriya dated 31 August 2018 as evidence of functional English.
12. The first named applicant is an Indian national. He is married and has two children aged seven and two. Both children were born in Australia. All of the applicants' blood relatives live in India. Both Mr and Mrs Pindoriya completed a Bachelor of Commerce degree in India. In addition, Mrs Pindoriya completed a Master of Commerce degree and gained three years of work experience working as a manager at a high school in India.
 13. They first arrived in Australia in November 2008 holding Student visas. Mr Pindoriya was the primary visa holder and by 2010 he had completed a Certificate IV in furniture making and design technology at Northern Melbourne Institute.
 14. In his evidence Mr Pindoriya confirmed that, with the applications for Subclass 186 visas, he submitted a copy of the letter from the College dated 1 December 2016, where it was stated that the medium of instruction for Mrs Pindoriya's Bachelor of Commerce degree completed in India was English. He gave evidence that his former migration agent advised him to ask the College for this letter as it would be used as evidence of Mrs Pindoriya's functional English.
 15. Mr Pindoriya contacted his friend Manesh, who was living in India at the time and who completed the same degree at the same college as his wife. According to Mr Pindoriya's evidence, Mr Manesh attended the College in person, requested and was given a letter dated 1 December 2016. A copy of this letter was emailed to Mr Pindoriya.
 16. The Tribunal asked Mrs Pindoriya if she saw this letter prior to it being submitted to the Department and she confirmed that she did. The Tribunal enquired as to why she decided to submit this letter to the Department as evidence of her 'functional English' when she knew that the letter contained false and misleading information that the medium of instruction for the entire Bachelor of Commerce course was English. She stated that one of her subjects completed at the College was English language, and that the medium of instruction for that subject was English. She reiterated that she was not fully aware that the entire course needed to be completed in English language and that she misinterpreted the words 'course' and 'subject'.
 17. The Tribunal indicated to Mrs Pindoriya that it considers her explanation unconvincing. The Tribunal further indicated that it finds it difficult to accept that a person with her qualifications and work experience would not be able to understand the difference between words 'course' and 'subject'.
 18. The Tribunal explained the waiver provisions in PIC 4020(4) and asked the applicants if there were any compelling circumstances that affect the interests of Australia or compelling

and/or compassionate circumstances that affect the interests of an Australian citizen, permanent resident or eligible New Zealand citizen that justify the grant of the visa in this case.

19. Mr Pindoriya reiterated that his employer, Baseline Windows and Doors Australia Pty Ltd, will be adversely affected if he is unable to continue to work for this business. Mrs Pindoriya stated that she recently commenced an online business (sale of electrical items). The business has a monthly turnover of approximately \$30,000 and currently does not employ any Australian citizens or permanent residents.
20. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

21. The issue in this review is whether the visa applicant meets PIC 4020 as required by cl.186.213 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting three years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
22. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

23. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.

24. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
25. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
26. Based on the evidence before it the Tribunal finds that:
- With their application for Subclass 186 visas, the applicants submitted a copy of the letter from Shri J. B. Thacker Commerce College, from India dated 1 December 2016; and
 - The letter from Shri J. B. Thacker Commerce College dated 1 December 2016 contains false and misleading information that the medium of instruction for Ms Pindoriya's Bachelor of Commerce degree completed in India was English.
27. The main question for this Tribunal is whether false and misleading information contained in the letter of 1 December 2016 from Shri J. B. Thacker Commerce College is false and misleading *in a material particular*.
28. For the purposes of PIC 4020, the phrase 'information that is false or misleading in a material particular' is defined in PIC 4020(5) to mean information that is:
- false or misleading at the time it is given; and
 - relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.
29. For information to be 'false or misleading in a material particular' in the context of PIC 4020, there must be a visa criterion upon which the allegedly false information could materially bear.¹ The definition in PIC 4020(5)(b) focuses upon the materiality of the information. It applies to information which goes to something which will or might determine the visa application and is not concerned with information that is irrelevant to the visa requirements.² However, the referable criterion cannot be PIC 4020 itself.³
30. The delegate found the information contained in the letter from Shri J. B. Thacker Commerce College to be false and misleading in a material particular because it was relevant to Item 1114B(2)(b) (functional English) of Schedule 1 to the Regulations and to cl.186.4 (circumstances applicable for the visa grant) of Schedule 2 to the Regulations.
31. Schedule 1 of the Regulations prescribes the specific ways in which a non-citizen applies for a visa of a particular class. An application that is not made as set out in this Schedule is not valid and will not be considered: (see s.45, s.46 and s.47 of the Act). Importantly, Schedule 1 does not contain visa criteria.

¹ *Singh v MIAC* [2012] FMCA 145 (Driver FM, 24 April 2012) at [68].

² *Kaur v MIBP* [2014] FCCA 1264 (Judge Lloyd-Jones, 18 June 2014) at [80] and [81]. See also *Singh v MIBP* [2018] FCCA 1136 (Manousaridis J, 9 May 2018).

³ *Singh v MIBP* [2015] FCCA 1939 (Judge Barnes, 22 July 2015) at [63].

32. Item 1114B(2)(b) of Schedule 1 of the Regulations prescribes that second instalment of visa application charge is payable before grant of visa. For secondary applicants who are over 18 years of age, who were assessed as not having functional English and who satisfy the secondary criteria for the grant of a Subclass 186 (Employer Nomination Scheme) visa, there is (was at the relevant time) an additional payment of \$4,890.
33. Visa criteria are set out in Schedule 2 of the Regulations. The Tribunal finds that there is nothing in Schedule 2 relevant to a Subclass 186 visa that requires a secondary applicant to have a functional level of English language proficiency.
34. The Tribunal further finds that cl.186.4 does not contain visa criteria. This clause deals with 'circumstances applicable to visa grant' and, at cl.186.411, states that the applicant may be in or outside Australia when the visa is granted, but not in immigration clearance.
35. Accordingly, despite the Tribunal's finding that the letter from Shri J. B. Thacker Commerce College dated 1 December 2016 contains false and misleading information; the Tribunal is not satisfied that this false and misleading information is relevant in a material particular as there is no visa criterion upon which the false information could materially bear.
36. The Tribunal considered whether the letter from Shri J. B. Thacker Commerce College dated 1 December 2016 is a bogus document within the meaning of s.5 of the Act which defines bogus document as:
37. in relation to a person, means a document that the Minister reasonably suspects is a document that:
- (a) purports to have been, but was not, issued in respect of the person; or
38. is counterfeit or has been altered by a person who does not have authority to do so; or
- (b) was obtained because of a false or misleading statement, whether or not made knowingly
39. There is no evidence before the Tribunal that the letter from Shri J. B. Thacker Commerce College dated 1 December 2016 was not issued in respect of Mrs Pindoriya or that the letter is counterfeit or has been altered by a person who does not have authority to do so. Similarly, there is no evidence before the Tribunal that the letter was obtained because of a false or misleading statement.
40. As a result, the Tribunal is not satisfied that there is sufficiently probative evidence that the third named applicant has given, or caused to be given, to the Minister, or an officer of the Department, the Tribunal or a relevant assessing authority a bogus document or information that is false or misleading in a material particular in relation to her application for a Subclass 186 visa or in relation to a visa held in the 12 months before the visa application was made. Accordingly, the Tribunal finds that the third named applicant meets the requirements of PIC 4020(1) for the purposes of cl.186.313(1) of Schedule 2 to the Regulations.
41. PIC 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing three years before the application was made to the present. There is no evidence before the Tribunal that the applicant and each member of the family unit have been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing three years before the application was made to the present.

42. PIC 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity. Having regard to the applicant's passport located on the Department's file the Tribunal is satisfied as to the applicant's identity. Therefore, the applicant meets PIC 4020(2A).
43. PIC 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the application is granted or refused. There is no evidence before the Tribunal that the applicant or members of his family have been refused a visa because of a failure to satisfy identity requirements during the relevant period. Therefore the applicant meets PIC 4020(2B).
44. On the basis of the above, the third named applicant satisfies PIC 4020 for the purposes of cl.186.313(1).
45. As the Tribunal found that the third named applicant meets PIC 4020 for the purposes of cl.186.313, the Tribunal finds that the first named applicant meets cl.186.213(3).

DECISION

46. The Tribunal remits the applications for Employer Nomination (Permanent) visas for reconsideration, with the directions that:
 - the third named applicant meets the Public Interest Criterion 4020 for the purposes of cl.186.313(1) of Schedule 2 to the Regulations; and
 - the first named applicant meets cl.186.213(3) of Schedule 2 to the Regulations.

Antonio Dronjic
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is **false or misleading in a material particular** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...